No. 17–742

IN THE

Supreme Court of the United States

MARY ANNE SAUSE,

Petitioner,

v.

TIMOTHY J. BAUER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

The Tenth Circuit's decision creates a serious conflict with precedents of this Court, transforming qualified immunity into a shield that will protect even conduct that violates clearly established First Amendment rights. The Tenth Circuit held that the officers were entitled to qualified immunity because no prior case has addressed an identical "factual scenario," App. 8a, even though this Court's precedent rejects any such requirement. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Specifically, the Tenth Circuit permitted a substantial burden to be placed on Petitioner's religious practice even though Petitioner's complaint alleged (1) that the officers' only motivation in burdening Petitioner's religion was to "harass her," App. 7a, and (2) that the officers' actions did "nothing to further their investigation," App. 9a.

That holding conflicts with this Court's precedent. In *Hope*, this Court "expressly rejected a requirement that previous cases be 'fundamentally similar'" or involve "'materially similar' facts." 536 U.S. at 741 (citation omitted). Respondents contend that the decision below is consistent with *Hope* because it recognized the theoretical possibility that *some* case could present such "obviously egregious" facts that *Hope* might apply. Opp. 14. But if *this* case does not satisfy that standard, *Hope* is effectively a dead letter in the Tenth Circuit.

Summary reversal, or plenary review, is appropriate not only to correct the Tenth Circuit's mistaken view of the law, but to affirm *Hope*'s continuing vitality and ensure that lower courts do not make the qualified immunity bar impossible to clear, even in cases

involving egregious and obvious constitutional violations.

I. THE TENTH CIRCUIT'S MISAPPREHENSION OF QUALIFIED IMMUNITY UNDER *HOPE V. PELZER* WARRANTS THIS COURT'S REVIEW.

A. The Court of Appeals Defied this Court's Precedent When It Concluded that Officers Lacked Fair Warning that the First Amendment Bars Imposing a Substantial Burden on Religion Without Any Legitimate Government Interest.

Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Thus the "salient question" in determining whether law is clearly established "is whether the state of the law at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (alterations in original) (quoting *Hope*, 536 U.S. at 741). This Court's precedent unambiguously holds that defendants may have such "fair warning" without an existing case presenting an identical "factual scenario." App. 8a. The Tenth Circuit's departure from this precedent warrants this Court's review.

1. Every officer has, and had at the time of Respondents' actions, fair warning that it is unconstitutional to substantially burden the free exercise of religion without *some* legitimate government interest. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of*

Hialeah, 508 U.S. 520, 531–32 (1993); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Even in the prison context, where constraints on liberty are at their peak, it is clearly established that government officials cannot substantially burden an incarcerated person's right to religious exercise—including by preventing prayer—unless "it is reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349–53 (1987). *See also Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989).

Here, Ms. Sause was not even under arrest, much less incarcerated, when her First Amendment rights were violated. In fact, she was in the "protected privacy" of her home. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Yet the officers ordered her to stop praying, despite the absence of any legitimate government purpose. That unlawful conduct violated Ms. Sause's clearly established rights under the First Amendment.

First, Ms. Sause's complaint clearly alleges a substantial burden on the exercise of religion. When government officials put "substantial pressure on an adherent to modify [her] behavior . . ., a burden upon religion exists." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). This Court has long recognized that engaging in prayer is a core religious exercise. *Engel v. Vitale*, 370 U.S. 421, 424 (1962) ("There can, of course, be no doubt that . . . prayer is a religious activity").

Coercion to cease religious exercise is a substantial burden. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) (noting that whether a

burden is substantial depends "on the coercive impact of the government's actions"). *See also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"). And an order to stop praying from a police officer is coercive. *McEachin v. McGuinnis*, 357 F.3d 197, 204–05 (2d Cir. 2004) (holding that inmate stated free exercise claim when he alleged he would be "disciplined for failing to obey an order expressly given to him by a corrections officer who knew that completion of the task would require plaintiff to abandon religious prayers in which he was then engaged"); *United States v. Allen*, 813 F.3d 76, 88 (2d Cir. 2016) ("The command of an officer, legally entitled to make an arrest . . . [is] a sufficient exercise of authority to require the suspect to comply.").

It has been understood since colonial days that preventing a citizen from praying in her own home substantially infringes on her free exercise of religion. As an example of religious persecution under colonial rule, Thomas Jefferson described acts of the Virginia Assembly that targeted Quakers by prohibiting "all persons from suffering their meetings in or near their houses." Thomas Jefferson, *Notes on the State of Virginia* 261–62 (J. Stockdale 1787). Indeed, as this Court has recognized, "the First Amendment . . . tried to put an end to governmental control of religion and of prayer." *Engel*, 370 U.S. at 435. The direct suppression of religious expression in the home—rare as it may be today—was among the ills that animated the adoption of the First Amendment. *Id.* at 433 (describing "persecutions of people like John Bunyan who

persisted in holding 'unlawful (religious) meetings'") (citing *A Relation of the Imprisonment of Mr. John Bunyan*, reprinted in *Grace Abounding and The Pilgrim's Progress* 103–132 (Brown ed. 1907), which describes Bunyan's house arrest). *See also* Br. for State of Texas at 9–10.

Second, Ms. Sause's complaint clearly alleges facts demonstrating that the officers lacked any legitimate government interest in ordering her to stop praying, as the Tenth Circuit recognized. When Stevens asked Ms. Sause what she was doing, Lindsay "laughed and told Stevens 'in a mocking tone' that Sause was praying." App. 4a. The officers "interrupt[ed] their investigation," App. 8a, "so they could harass her," App. 7a. Perhaps most significant, this harassment did "nothing to further their investigation." App. 9a. These allegations belie any legitimate government interest.

Third, because Ms. Sause alleges that her religious practice was substantially burdened in the absence of any legitimate government interest, these two principles clearly establish that the officers do not, at the pleading stage, enjoy qualified immunity against her First Amendment claim. As Chief Judge Tymkovich put it, the facts alleged in the complaint were "inconsistent with any legitimate law enforcement purpose capable of justifying" the officers' conduct. App. 19a.[1] No "reasonable officer" could believe that the Constitution permits him to burden religious

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[1] Tenth Circuit thus assumed (correctly) that the officers violated Ms. Sause's First Amendment rights, because she plausibly alleged that the officers "ordered her to stop praying" not for any legitimate interest, but "so they could harass her." App. 7a.

practice in the absence of any legitimate law enforcement interest. *Saucier*, 533 U.S. at 202.

2. The Tenth Circuit's decision that the officers were nonetheless entitled to qualified immunity rests on its conclusion that no prior case of which it was aware "has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a. But imposing that as a requirement to defeat qualified immunity conflicts with this Court's decision in *Hope*, where this Court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741. As this Court has explained, the "easiest cases don't even arise" because "outrageous conduct," such as the officers' mistreatment of Ms. Sause, "obviously will be unconstitutional." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009). In other words, "[c]ertain actions so obviously run afoul of the law" as to overcome qualified immunity even under factual circumstances not yet recorded by a court. *Hope*, 536 U.S. at 753–54. That is precisely the case here. Because it is "so well understood" that prohibiting citizens from engaging in religious practices (such as prayer) in the absence of any legitimate government interest violates the First Amendment, relatively "few violations are recorded in [appeals court] opinions." *Lukumi*, 508 U.S. at 523.

Respondents argue that the Tenth Circuit's decision did not conflict with *Hope* because the court inquired whether the alleged conduct was "obviously unlawful." Opp. 14. To be sure, the court of appeals briefly acknowledged that a factually similar case

may not be required if defendants' conduct is "obviously egregious." App. 9a (citing *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008)). But that standard, too, conflicts with *Hope*. Under *Hope*, qualified immunity does not rise and fall with whether the facts were "obviously egregious" in the eyes of the court. Rather, "the Court of Appeals ought to have asked . . . whether the state of the law . . . gave respondents fair warning that their alleged treatment of [Ms. Sause] was unconstitutional." *Hope*, 536 U.S. at 741. Because this Court's precedent makes it abundantly clear that government officials cannot burden religious exercise for the purposes of harassing religious adherents, the court of appeals would unavoidably have reached the opposite conclusion had it framed the question in this way.

Moreover, even taking the Tenth Circuit's approach on its own terms, if *this* case does not present sufficiently "egregious" conduct to defeat qualified immunity—notwithstanding the absence of any factually identical case—then *Hope* has effectively been overruled *sub silentio* in the Tenth Circuit.

Respondents further depart from this Court's precedent by arguing that Ms. Sause frames her free exercise rights at "a high level of generality." Opp. 15. Not so. This Court has never held that officers presented with a clearly established rule—*e.g.*, religious practice may not be substantially burdened in the absence of a legitimate government interest—may freely defy that rule and interfere with a citizen's religious practice for no other reason than an intent to harass the citizen so long as the *specific* burden has not be recorded in clearly established precedent. Where, as here, "the violation was so obvious," officers have "fair

warning that their conduct violate[s] the Constitution" even absent more specific case law. *Hope*, 536 U.S. at 741.

Respondents (at Opp. 16) also analogize this case to *Brosseau v. Haugen*, 543 U.S. 194 (2004), and *Mullenix v. Luna*, 136 S. Ct. 305 (2015), but both of those cases involved the reasonableness of searches under the Fourth Amendment. As the Court explained, because the Fourth Amendment's proscriptions are "cast at a high level of generality" and officers must make difficult judgments about whether a search or seizure is reasonable in widely varying situations, *Brosseau*, 543 U.S. at 199, "specificity is especially important in the Fourth Amendment context" for overcoming qualified immunity, *Mullenix*, 136 S. Ct. at 308. *See* Pet. 17–18. But Ms. Sause is not asking the Court to decide whether the officers' investigation was unreasonable—a question that would implicate the concerns in *Brosseau* and *Mullenix*—but rather whether the officers had fair warning that ordering a religious adherent to stop praying solely for the sake of "harass[ing]" her, and without any legitimate government purpose, violated her First Amendment rights.

The "constitutional rule" that officers may not impose a substantial burden upon religious exercise without a legitimate government interest "appl[ies] with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741 (citation omitted). This Court should grant review and reverse the Tenth Circuit's contrary judgment.

B. Respondents Attempt to Manufacture Factual Disputes Where There Are None.

Respondents also attempt to prevent review of the Tenth Circuit's judgment by manufacturing factual disputes, rather than taking the facts alleged in Ms. Sause's complaint as the Tenth Circuit found them. *E.g.*, Opp. 11 ("Sause instead poses an alternate set of facts").

Disregarding the Tenth Circuit's conclusion that the complaint alleged that the officers acted without any legitimate government interest, Respondents characterize their harassment as a polite request for Ms. Sause to pause her prayer so that they could conclude their investigation. Opp. 7. And they further contend that because they were responding to a noise complaint, the "circumstances of the investigation" provided blanket justification for their conduct. Opp. 7.[2]

Whether Respondents can prove these defenses on remand is beside the point. The issue before this Court is whether, taking as true the facts pleaded in the complaint and considered by the Tenth Circuit, the court of appeals created a conflict with this Court's precedent by concluding that a more specific, on-point case is required before qualified immunity may be defeated. That is, the Court must consider whether the

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[2] *See, e.g.*, Opp. 6 ("The Officers continued to pursue legitimate law enforcement purposes after asking her to stop praying"), Opp. 12 ("[a]sking the subject . . . to stop praying for the few minutes until the officers concluded their investigation"), Opp. 19 ("The imposition upon Sause was brief and resulted directly from a legitimate and ongoing investigation").

court of appeals created a conflict with this Court's precedent by applying qualified immunity even though, on the facts alleged, the government "mock[ed]" Ms. Sause's prayer, "demanded that she '[g]et up' and '[s]top praying,'" and did so not for any legitimate investigative purpose but "so they could harass her." App. 4a, 7a. Respondents may attempt to demonstrate on remand that, as a factual matter, their actions *did* further a legitimate interest. But on this record, the complaint established that the officers acted purely for the purpose of harassment. *See* App. 19a ("Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying a continuing police intrusion in her home").

The Court can and should disregard Respondents' effort to manufacture a barrier to this Court's review by disputing Ms. Sause's allegations. The only issue presented is whether the Tenth Circuit contravened this Court's precedents in requiring a case on point despite the "'fair and clear warning'" that the officers' conduct violated the First Amendment. *Hope*, 536 U.S. at 746 (citation omitted). Because the court of appeals created a clear conflict with *Hope*, this Court's review is necessary.

II. DENIAL OF QUALIFIED IMMUNITY HERE WILL NOT HINDER LAW ENFORCEMENT.

Respondents warn that denying them qualified immunity would negatively impact "day-to-day law enforcement." Opp. 20. That unsupported assertion does not counsel against review. In fact, *amici curiae* former federal prosecutors explain that "legitimate law-enforcement interests will *not* be undermined by

denying qualified immunity based on the allegations in petitioner's complaint." Br. of Former Federal Prosecutors at 1. *Amicus* State of Texas agrees that notwithstanding the "important function" qualified immunity serves, "in the rare instances where . . . clearly established rights are infringed, qualified immunity must necessarily give way," and "this is one of those rare cases." Br. for State of Texas at 2.

It is exceptional that former federal prosecutors and a State, both of whom support robust application of the doctrine of qualified immunity (*see, e.g.*, Br. of Former Federal Prosecutors at 1; Br. for State of Texas at 1), would file briefs in favor of a petitioner whose claim was dismissed on that basis. But this case is exceptional.

As *amici* explain, enforcing the "important limits" on qualified immunity would "reassure the public that officers who act in knowing disregard of the public's constitutional rights will be held liable for abuses." Br. of Former Federal Prosecutors at 1. "[E]rroneous grants of qualified immunity," by contrast, "undermine the rule of law and strain the relationship between police and the public, hindering law enforcement in fulfilling its responsibilities." *Id.* at 4–5. Thus, contrary to Respondents' arguments, denying qualified immunity in this case of extreme unlawful conduct will *vindicate* the doctrine of qualified immunity, so that reasonable officers can rely on it in the future. *See White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citation omitted). Moreover, it will clarify the application and continuing vitality of *Hope*.

Indeed, while Respondents assert that reversing the Tenth Circuit would result in a dramatic expansion of constitutional claims (*see*, *e.g.*, Opp. 18, 20), it is their position, rather than Ms. Sause's, that calls for a sweeping rule: that qualified immunity must be granted even for violations of citizens' clear, long established rights unless a prior court has addressed identical facts in a prior case. Particularly given that the courts of appeals can, as the Tenth Circuit did here, simply assume *arguendo* the constitutional violation, Respondents' rule would permit egregious violations of the Constitution to occur over and over again, yet qualified immunity would never be overcome because of the absence of a case directly on point. Denying qualified immunity when an official shows "extraordinary contempt of a law abiding citizen" and engages in "reprehensible conduct," App. 17a (Tymkovich, C.J., concurring), preserves the legitimacy of grants of qualified immunity for conduct that does not violate clearly established law.

CONCLUSION

The Court should either summarily reverse the judgment of the court of appeals, or grant the petition for a writ of certiorari, set the case for full merits briefing and argument, and reverse the judgment below.

Respectfully submitted.

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